FILED
AUG 3 1992
OFFICE OF THE CLERK

No. 91-1721

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
Petitioner,

v.

CITY OF JACKSONVILLE, FLORIDA and TOMMY HAZOURI, in his official capacity as Mayor of the City of Jacksonville,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

G. Stephen Parker*
Deborah A. Ausburn
Southeastern Legal Foundation, Inc.
2900 Chamblee-Tucker Rd., Bldg. 4
Atlanta, Georgia 30341
(404) 458-8313

Attorneys for Petitioner

August 3, 1992

* Counsel of Record

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. FEDERAL APPELLATE AND DISTRICT COURTS HAVE ESTABLISHED CONFLICTING RULES REGARDING STANDING TO CHALLENGE RACE-CONSCIOUS PROGRAMS 2

II. REQUIRING THAT A PLAINTIFF BE ABLE TO IDENTIFY IN ITS PLEADINGS A SPECIFIC CONTRACT LOST DUE TO A RACE-CONSCIOUS PROGRAM CONTRADICTS THE PRECEDENT OF THIS COURT 3

CONCLUSION 7

TABLE OF AUTHORITIES

Lucas v. South Carolina Coastal Council,
____ U.S. _____, 60 U.S.L.W. 4842,
1992 Westlaw 142517 (1992) . . . . . 3, *passim*

Lujan v. Defenders of Wildlife,
____ U.S. ____, 112 S.Ct. 2130 (1992) . . . . . 4, *passim*

O'Donnell Construction Co. v. District of Columbia,
963 F.2d 420 (D. C. Cir. 1992) 2

INTRODUCTION

Pursuant to Rule 15.7 of the Supreme Court Rules, Petitioner respectfully presents to this Court the following supplemental authority that was not available at the time that Petitioner filed its initial Petition for Writ of Certiorari.

As shown by Petitioner in its intial Petition, the question presented for review is whether an association challenging a racially exclusive government ordinance must show that, absent the ordinance, its members actually would have received a government contract. Petitioner urged this Court to grant certiorari in order to clarify a split in the lower federal courts and because the decision of the Eleventh Circuit Court of Appeals was contrary to the precedent of this Court. Since the time that Petitioner filed its initial petition, the Court of Appeals for the District of Columbia and this Court have rendered decisions that illustrate the need for this Court to review the Eleventh Circuit's erroneous requirements of injury-in-fact.

I. FEDERAL APPELLATE AND DISTRICT COURTS HAVE ESTABLISHED CONFLICTING RULES REGARDING STANDING TO CHALLENGE RACE-CONSCIOUS PROGRAMS.

On page 12 of its Petition for Writ of Certiorari, Petitioner AGC cited *O'Donnell Construction Co. v. District of Columbia*, 762 F. Supp. 354 (D.D.C. 1991). Since the original petition was filed, the Court of Appeals for the District of Columbia has considered that case. *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992). The appellate court reversed the district court's refusal to issue an injunction prohibiting enforcement of the District's minority business enterprise ordinance, *id.*, but agreed with the district court on the plaintiff's standing. "The district court was right in rejecting [the standing] challenge on the ground that the complaint, backed by Arnold J. O'Donnell's affidavit, alleged that the company . . . was suffering an injury because of the MBE program, which *deprived the company of the opportunity to compete on an equal footing* for the District's contracts." *Id.* at 423 (emphasis added). Noting that

the defendant had not pursued its standing challenge on appeal, the court found further analysis unnecessary. *Id.*

II. REQUIRING THAT A PLAINTIFF BE ABLE TO IDENTIFY IN ITS PLEADINGS A SPECIFIC CONTRACT LOST DUE TO A RACE-CONSCIOUS PROGRAM CONTRADICTS THE PRECEDENT OF THIS COURT.

In *Lucas v. South Carolina Coastal Council*, ___ U.S. _____, 60 U.S.L.W. 4842, 1992 Westlaw 142517 (1992), this Court considered the question of injury-in-fact in relation to a takings claim under the fifth amendment to the U.S. Constitution. Petitioner David Lucas, who had been prevented from making any economically viable use of his coastal property because of a coastal protection bill enacted by the State of South Carolina, sued for compensation. Before reaching the merits of the takings claim, this Court determined that Lucas in his complaint "properly alleged Article III injury-in-fact in this case," *id.* at p. 5, at least in regard to the earlier version of the statute enacted in 1989. Lucas had asked "'damages for the temporary taking of his property'"

dating from the initial enactment of the state statute. *Id.* at p. 5, n. 3. The Court stated, "No more can reasonably be demanded." *Id.*

Lucas never submitted a development plan for his property to the appropriate state authorities and was never actually denied the right to build on his property. *Id.* at p. 5, n.3. Nevertheless, this Court found Lucas's failure to be no bar to standing because of the stipulation in the record that he would have received no permit under the 1989 statute, and "such a submission would have been pointless." *Id.*

The *Lucas* opinion noted the contrary result in *Lujan v. Defenders of Wildlife*, ____ U.S. ____, 112 S.Ct. 2130 (1992). In that case, as the respondent in this case has noted, this Court held that plaintiffs in an environmental lawsuit had failed to prove sufficient injury-in-fact from environmental harms occurring outside the United States. The Court made a significant distinction, however, between the proof required at the pleading stage and that required in response to a motion for summary

judgment challenging standing. The Court specifically stated (in the section quoted by respondents in this case) that at the pleading stage, general factual allegations may suffice. *Id.*, 112 S.Ct. at 2137. In response to a motion for summary judgment, however, the plaintiff must present affidavits or other evidence setting forth "specific facts." *Id.*

In the *Lucas* decision, this Court further clarified this distinction. Because of the way that the South Carolina court had foreclosed further pleading in regard to Mr. Lucas's claim under the 1989 state statute, this Court addressed that particular claim "as if the case were here on the pleadings alone." *Lucas*, 1992 Westlaw 142517 at p. 5, n. 3. *Lujan*, by contrast, involved a motion for summary judgment and required "specific facts to be adduced by sworn testimony." *Id.* If the respondent in *Lujan*, had challenged the generalized allegations of injury-in-fact at the pleading stage, the challenge "would have been unsuccessful." *Id.*

Similarly, the standing issue in the instant case should be considered in light of the pleadings. Although the district court

did grant summary judgment to AGC on the merits of the case, AGC's standing was never an issue in that court. In fact, the city filed its own motion for judgment on the pleadings (or in the alternative summary judgment) on the merits of the ordinance, but never challenged AGC's standing. As in *Lucas*, standing came up only after the record was closed in the trial court. The Eleventh Circuit Court of Appeals foreclosed any possibility of evidence being presented on AGC's claim by ordering it dismissed rather than returned to the trial court for further proceedings.

Thus, AGC's standing should be considered on the basis of its pleadings rather than any failure to meet a nebulous, *ex post facto* standard. AGC presented no evidence of actual contracts lost because of the Jacksonville ordinance, but like David Lucas, it demonstrated that such applications would, at least 10% of the time, be futile. Like David Lucas, it presented sufficiently specific injuries in its pleadings to withstand the scrutiny appropriate for that stage of the trial. It is only if the court applies the more strict, inappropriate summary judgment standard that

AGC's evidence falls short. As this Court recognized in its most recent decisions, pleadings are different from summary judgment. The instant case falls within the parameters of *Lucas*, not *Lujan*.

CONCLUSION

For all of these reasons, Petitioner respectfully requests that this Court grant its petition for writ of certiorari.

Respectfully submitted,

G. Stephen Parker*
Deborah A. Ausburn
SOUTHEASTERN LEGAL FOUNDATION, INC.
2900 Chamblee-Tucker Rd., Bldg. 4
Atlanta, Georgia 30341
(404) 458-8313

Attorneys for Petitioner

* Counsel of Record

August 3, 1992